Supreme Court, U.S.
F I L E D
JUN 11 1992
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No. 91-1757

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

TIMOTHY DALE BUNCH, Petitioner,

v.

CHARLES E. THOMPSON, Warden,
MECKLENBERG CORRECTIONAL CENTER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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June 11, 1992

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

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PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, Petitioner Timothy Dale Bunch, by counsel, hereby replies to Respondent's Opposition to his Petition for Certiorari. Bunch's Reply addresses arguments first raised in Respondent's Opposition.

I. RESPONDENT IGNORES THE MAJORITY OPINIONS OF THIS COURT, AND HIS RELIANCE UPON CONCURRING OPINIONS AND A MISREADING OF THIS COURT'S RULINGS IN AN EFFORT TO DEMONSTRATE THAT EDWARDS WAS AMBIGUOUS SHOULD BE REJECTED.

Respondent asserts that this Court's decision in Edwards v. Arizona, 451 U.S. 477 (1981) left substantial doubt as to whether a suspect who has asserted his right to counsel must reinitiate interrogation before a finding of waiver. See Respondent's Brief in Opposition at 7 ("Respondent's Opp."). In support of this assertion, respondent relies heavily upon the concurring opinions in Edwards and Oregon v. Bradshaw, 462 U.S. 1039 (1983), as well as this Court's decisions in Wyrick v. Fields, 459 U.S. 42 (1982) and Minnick v. Mississippi, 111 S. Ct. 486 (1990). Bunch submits that respondent's assertion ignores the opinions of the majority of the Court in Edwards and Bradshaw, and is based on a misreading of Wyrick and Minnick.

A. A Majority Of The Court Has Consistently Held Edwards To Be Clear.

Bunch recognizes that a lone concurring opinion in Edwards and Bradshaw expressed uncertainty as to whether Edwards announced a per se rule. Bunch submits, however, that it is the majority of the Court that sets down a rule in a given case, and that the opinions of the court in Edwards and Bradshaw demonstrate that the rule in effect at the time Bunch's conviction became final was not ambiguous.

First, in Edwards, six justices held that:

> [A]n accused . . . having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges or conversations with the police.

Edwards, 451 U.S. at 484-885 (emphasis added).

The majority opinion in Edwards was neither ambiguous nor equivocal. Indeed, the court in Edwards reiterated the point when it added that any finding of a valid waiver must include "the necessary fact that the accused, not the police reopened the dialogue with the authorities." Id. at 486 and n.9. The clear language used by the majority leaves no doubt but that the Court intended to "set forth a bright line rule that all questioning must cease after an accused requests counsel", unless the accused initiates further conversations. See Smith v. Illinois, 469 U.S. 91, 95 (1984).[1/]

Moreover, despite the confusion voiced in the concurring opinion in Bradshaw, a majority of the Bradshaw Court acknowledged and applied the two step inquiry required by Edwards. "[W]e held that after the right to counsel had been asserted by an accused, further interrogation of the accused should not take place 'unless the accused himself initiates

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1/ See also Michigan v. Jackson, 475 U.S. 625, 634 (1986) ("one of the characteristics of Edwards is its clear, 'bright-line' quality"); Minnick, 111 S.Ct. at 490 ("the merit of the Edwards decision lies in the clarity of its command and the certainty of its application").

further communication.'" The plurality opinion established first that it was the defendant who initiated the renewed conversation with the police. Bradshaw, 462 at 1044. The Court then went on to conclude that petitioner had waived his right to counsel under the Johnson v. Zerbst, 304 U.S. 458 (1938) standard. Bradshaw, Id. at 1046. Even the concurring Justice recognized the fact that all of the other Justices considered the initiation inquiry to be a necessary part of the analysis. Id. at 1048 (the plurality and dissent "agree in one respect. They view the 'initiation' question as the first step of a two-step analysis. . . ."). Significantly, eight Justices agreed that Edwards altered the Zerbst standard for waiver and hence established a per se rule. Id. at 1054, n.2. (Marshall, J., Brennan, J., Blackman, J. and Stevens, J., dissenting)

Thus, respondent's assertion that Edwards and Bradshaw contain some ambiguity ignores the sentiment of the majority in those cases. As Judge Sprouse of the Fourth Circuit remarked in his dissent, "it goes without saying that if the majority of the Supreme Court holds the Edwards opinion to be clear . . . it is clear." Bunch v. Commonwealth, 949 F.2d 1354, 1369-70 (4th Cir. 1991).

B. Respondent Misreads This Court's Opinion In Wyrick.

Respondent argues that the Virginia Supreme Court's characterization of Edwards as vague was reasonable in light of Wyrick v. Fields, supra. The petitioner in Wyrick invoked his right to counsel and later reinitiated conversations with the

authorities by requesting a lie detector test. After the test, the authorities informed him that there was evidence of deceit, and Wyrick incriminated himself. The Eighth Circuit concluded that while Wyrick initiated the conversations with the authorities, his rights were violated when those authorities failed to advise him of his rights again prior to eliciting incriminating statements. Wyrick, 459 U.S. at 43-47. The court did not analyze whether Wyrick had waived his right under the Zerbst standard. Id. While this Court agreed with the finding that Wyrick initiated the colloquy, it reversed the Eight Circuit's ruling because that court did not apply the second step of the test: the Zerbst waiver standard. Id.

Respondent finds comfort in Wyrick only by misapplying it and lifting quotations out of context. Respondent suggests that this Court was still following the old Zerbst test in Wyrick and that this Court had not yet identified initiation as a separate inquiry.

Contrary to respondent's assertion, see Respondent's Opp. at 8, the Supreme Court did not reverse the Eighth Circuit's ruling because the Eighth Circuit regarded Edwards as establishing a per se rule. Rather, the Court reversed the decision because the Eighth Circuit went beyond Edwards and fashioned another per se rule of its own, requiring that the police advise a suspect of his rights a second time notwithstanding a voluntary and intelligent waiver. Wyrick, 459 U.S. at 48. When the Court faulted the Eighth Circuit for

failing to apply the Zerbst totality of circumstances test, it was operating from the premise that the first step of the inquiry -- who initiated the exchange -- was not an issue in the case. The only question to be resolved was whether the Eighth Circuit had properly approached the second step of the inquiry.

In fact, the Wyrick Court reiterated the clarity of Edwards:

> In Edwards, this Court had held that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided unless the suspect himself initiates dialogue with the authorities.

Id. at 46 (citations omitted); see also Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1982) ("We recently restated the requirement in Wyrick, to be that before a suspect . . . can be subjected to further interrogation . . . there must be a showing that the 'suspect himself initiates dialogue with the authorities.'").

Thus, the Virginia high court's "heavy reliance" on Wyrick is based upon a misunderstanding of that case, and its 1983 decision was contrary to the law as set down by this Court.

C. Contrary To Respondent's Suggestion, This Court's Decision In Minnick Supports Bunch's Claim.

Respondent claims that Minnick v. Mississippi, indicated that the decision in Edwards was ambiguous, and he points to the following quotation:

> Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.

See Respondent's Opp. at 13.

Respondent's use of Minnick is misleading and disingenuous. Minnick did not involve the question of whether a suspect who has asserted his right to counsel must be the one to initiate further conversation before a finding of waiver can be made. That issue was resolved in Edwards. The issue presented in Minnick, and the "point" to which the Court was referring when it noted the possibility of ambiguity in earlier cases, was whether the police may reinitiate interrogation after the suspect has consulted with counsel, even if the attorney is no longer present. Minnick, 111 S. Ct. at 488.

Minnick did not suggest that Edwards might have been ambiguous. The Court was concerned with a situation not explicitly addressed in Edwards, and in announcing its decision, it reaffirmed that Edwards was clear:

> The merit of the Edwards decision lies in the clarity of its command and the certainty of its application. We have confirmed that the Edwards rule provides "clear and unequivocal" guidelines to the law enforcement profession.

Id. at 490.

II. RESPONDENT'S FAILURE TO ADDRESS THIS COURT'S OPINION IN SHEA v. LOUISIANA UNDERMINES HIS CONTENTION THAT SOLEM v. STUMES ESTABLISHED A "NEW RULE".

Respondent maintains that Solem v. Stumes was the first Supreme Court case to clarify that Edwards established a per se rule. It follows, respondent argues, that since Solem was decided after Bunch's conviction became final, Bunch is precluded from reaping the benefits of that "new rule." Bunch maintains that conclusion is unsupported. The simple fact is that Solem did not clarify Edwards, and it did not establish a new rule. Rather, Solem merely repeated the rule in Edwards and applied it to the facts before the Court. See Michigan v. Jackson, 475 U.S. 625, 626 (1986) ("In Solem v. Stumes we reiterated that Edwards established a bright-line rule to safeguard pre-existing rights.") (emphasis added).

Moreover, Shea v. Louisiana, 470 U.S. 51 (1985), establishes that the clear holding of Edwards is applicable to Bunch. The issue in Shea was whether Edwards should be applied to cases which were pending on direct appeal at the time Edwards was decided (May 18, 1981). Id. The Court held Edwards to be applicable to those defendants whose convictions had not already become final before Edwards was decided. Id. at 58-59.

Bunch's conviction became final over two years after Edwards was decided. Thus, under Shea, Edwards is applicable to Bunch. Both respondent and the Fourth Circuit ignored Shea. Bunch respectfully urges this Court to apply Shea and reject respondent's retroactivity argument.

III. RESPONDENT'S CONTENTION THAT AUTHORITIES WERE MERELY SEEKING TO CLARIFY AN AMBIGUOUS REQUEST FOR COUNSEL FLIES IN THE FACE OF THE TRIAL COURT'S FINDING AND IGNORES THE CLEAR RULE IN EDWARDS

Respondent contends that Bunch did not unequivocally invoke his right to counsel in Japan. See Respondent's Opp. at 10. Thus, respondent argues, when Officer Cahill reopened communication by asking Bunch "if he felt he was ready to sit down and go over the case," he was making a permissible attempt either to clarify Bunch's "ambiguous" remark,[2/] or to determine whether Bunch had satisfied his desire for counsel by consulting with the military lawyer. Respondent's Opp. at 10-11, 18-19 (citations omitted). Bunch submits that respondent's attempt to undermine the trial court's factual finding that Bunch invoked his right to counsel is merely an attempt to divert this Court's attention from the straightforward question of whether the holding of Edwards applies in this case.

2/ Respondent's claim that Cahill's question can be considered to be an attempt to clarify Bunch's request is unsupported. First, the plain language of the statement itself belies respondent's contention. Cahill's question did not relate at all to Bunch's request for counsel, and it did not exhibit or seek to resolve any confusion as to Bunch's desires. Second, Bunch invoked his right to counsel in Japan, approximately 36 hours before Cahill reinterrogated him in Virginia. If Cahill believed that Bunch's request was equivocal, he should not have waited 36 hours to obtain a clarification. Finally, the fact that respondent advances not one, but two possibilities as to what Cahill was thinking indicates that the theories are equally speculative. This Court should not now be in the position of divining facts not contained in the record.

A. The Trial Court Found That Bunch Clearly Invoked His Right To Counsel.

As discussed in Bunch's Petition at 4-5, the Virginia authorities testified that Bunch mentioned the need for counsel on only one occasion, and that he stated, "he might want to talk to an attorney." Bunch testified that he repeatedly voiced his desire to have counsel. The trial court could not have been more forceful in its rejection of the testimony given by the Virginia authorities. It stated:

> I have no question in my mind . . . he [Bunch] indicated . . . that he should have an attorney present.

The trial court's factual finding that Bunch unequivocally requested and was denied his right to counsel is presumed to be correct in this Court, see 28 U.S.C. § 2254(d), and it is amply supported by the record.[3/] Respondent's

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3/ The trial court also found that Bunch's brief meeting with a military lawyer, who advised Bunch that he was not his attorney, but that his job was simply to inform Bunch of his transfer to civilian authorities, did not satisfy Bunch's right to counsel.

Respondent's statement that "Bunch agreed, that Bunch had said that 'he might want to talk to a lawyer,'" is a gross misrepresentation of the record. See Respondent's Opp. at 19. While the prosecutor attempted to get Bunch to agree to the investigator's characterization of his request for counsel, Bunch's trial counsel objected, and the trial court itself stated that "Bunch testified he told them [authorities] he wanted a lawyer. That's what he said." (A. 35). (A copy of this segment of the transcript is provided as Exhibit A for the convenience of the Court.)

strained attempt to reopen that settled question of fact is inappropriate, and thus, his lengthy discussion of whether the police may clarify an equivocal request is inapposite to the facts at hand.

B. Cahill Violated Edwards When He Initiated Further Conversations With Bunch.

Respondent maintains that Cahill "did not impermissibly initiate interrogation" of Bunch when he asked Bunch "if he felt he was ready to sit down and go over the case." Respondent's Opp. at 17-21. He claims Cahill was merely seeking to determine whether the conference with the civil lawyer who did not represent Bunch satisfied Bunch's request for counsel. Respondent thus invites this Court to consider the intent of the investigator when he initiated the exchange and to ignore the plain rule of Edwards.

Edwards simply asks who it was who initiated further "communications, exchanges or conversations," Edwards, 451 U.S. at 485, and it does not require that the exchange be deemed to constitute "interrogation" before a finding can be made that Edwards was violated. Even if a finding of "interrogation" is necessary, though, respondent cannot fairly argue that interrogation did not take place here.

This Court has defined interrogation as a practice "that the police should know [is] reasonably likely to evoke an incriminating response from a suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). The constitutional effect of the officer's conduct is a legal issue, and as such, it is subject to the independent review of this Court. Id. at 298-302; Miller v. Fenton, 474 U.S. 104, 112 (1985). When the Fourth Circuit accepted the Virginia Supreme Court's characterization of Cahill's actions as "reasonable," it failed to fulfill its duty to determine whether the Virginia court was right or wrong as a matter of constitutional law.

The Virginia court's analysis of what Cahill was doing when he spoke to Bunch was flawed under Innis. In determining whether comments by the police constitute "interrogation," Innis specifically requires courts to focus upon the "perceptions of the suspect, rather than the interest of the police." Innis, 446 U.S. at 301. Respondent may claim that Cahill was seeking to clarify whether Bunch's desire for counsel had been satisfied, but Cahill's question to Bunch did not contain the words "counsel," "attorney," "legal advice" or "satisfied," or any words synonymous or analogous to those terms. Thus, as perceived by Bunch, the question was an effort to prompt him to discuss the crime for which he was arrested, and Cahill was therefore interrogating Bunch under Innis.

Bunch submits, though, that respondent's focus on interrogation unnecessarily clouds the issue. Edwards

prohibits questioning of a defendant who, like Bunch, has asserted his right to counsel, "unless the accused himself initiates further communications, exchanges or conversations with the police." Edwards, 451 U.S. at 485. The word "initiate" has a clear and simple meaning, and Edwards does not authorize an exploration of the officer's purpose in reopening conversation. As Judge Sprouse remarked in his dissent, "clearly Cahill, not Bunch, initiated the conversation leading to the subsequent interrogation at the . . . police station, Bunch, 949 F.2d at 1370, and therefore, Edwards was violated.

IV. THIS COURT SHOULD DECLINE TO EXTEND STONE v. POWELL TO FEDERAL HABEAS CORPUS CASES INVOLVING CLAIMS OF FIFTH AMENDMENT AND MIRANDA VIOLATIONS

In Stone v. Powell, 428 U.S. 465 (1976), this Court held that federal habeas corpus review is not available to a criminal defendant who sought to have evidence seized in violation of the Fourth Amendment excluded at trial, provided that the state provided a full and fair opportunity to litigate the issue. This Court recently agreed to decide whether Stone should be extended to federal habeas corpus cases involving claims of Miranda and Fifth Amendment violations. Withrow v. Williams, 112 S. Ct. _____, 51 Cr. L. 3021, No. 90-103 (April 20, 1992). Bunch submits that it should not.

First, the rights secured by the Fourth Amendment protection against unreasonable searches and seizures are not inextricably linked to the fairness and accuracy of the

criminal process, as is the Fifth Amendment privilege against self-incrimination. See Brewer v. Williams, 430 U.S. 387, 414 (1977). While Mapp v. Ohio, 367 U.S. 643 (1961) established an exclusionary rule, Miranda and Edwards established prophylactic rules, procedural safeguards in the form of required warnings, to effectuate the Fifth Amendment privilege against self-incrimination, as well as an exclusionary remedy to enforce the warning requirement. The Fifth Amendment privilege, like the prohibition against the use of involuntary confessions, reinforces the underlying principle of our criminal justice system:

> [t]hat ours is an accusatorial and not an inquisitional system -- a system in which the state must establish guilt by evidence independently and freely served and may not by coercion prove its charge against the accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 541 (1961). Consequently, unlike the ruling in Mapp, Miranda and Edwards secure rights which are at the heart of American criminal law. Moreover, the Miranda and Edwards rules were not intended not just to sanction egregious police behavior, but to safeguard the accused's rights during custodial interrogation.

Second, the Stone Court deemed the elimination of Fourth Amendment claims in federal habeas proceedings to be beneficial because it avoided friction between state and federal courts and reduced the workload of the federal judiciary. Neither of these objectives would be accomplished by extending Stone to Miranda and Edwards claims. Habeas

petitioners would simply challenge confessions as having been made involuntarily under the case-by-case totality of circumstances test. As the Seventh Circuit recognized in White v. Finkbeiner, 687 F.2d 885, 893 (7th Cir. 1982), application of that test is more uncertain, and thus friction between state and federal courts would not be reduced. Moreover, application of the totality test would require "the expenditure of more federal judiciary resources than application of the comparatively perspicuous" Miranda and Edwards rules. Id.

Third, while it has been argued that the exclusionary rule in Fourth Amendment cases impedes the truth finding process, the prophylactic rule in Miranda, refined in Edwards, actually enhances the truth finding process by reducing the likelihood of coerced or involuntary, and thus unreliable, confessions. The Stone opinion was premised in part on the court's confidence that evidence seized in violation of the Fourth Amendment can still be considered to be reliable. This reasoning does not apply to Miranda and Edwards claims because unlike Fourth Amendment claims, they cannot be characterized as entirely non-guilt related. Id. at 894. Indeed, this Court has recognized the role played by the Miranda rule:

> [a]gainst the possibility of unreliable statements in every instance of in-custody interrogation . . . it provide[s] important new safeguards against the use of unreliable statements at trial.

Johnson v. New Jersey, 384 U.S.. 719, 730 (1966).[4/]

Finally, Bunch submits that even if this Court were to extend Stone to Miranda and Edwards claims, such a drastic "new rule" should not apply to him. See Stringer v. Black, 112 S. Ct. 1130 (1992) (new rules of criminal procedure only apply to defendants whose convictions have not become final prior to the announcement of the rule).

4/ Contrary to respondent's view, Bunch's claim does not involve a technical violation of Edwards, see Respondent's Opp. at 15, such as the failure to give complete warnings. Rather, the Edwards violation in this case denied Bunch the most crucial protection recognized in Miranda and Edwards, the right to have counsel present during custodial interrogation. See Minnick, 111 S. Ct. at 488-91.

CONCLUSION

For the above stated reasons, the contentions made in Respondent's Opposition should be rejected. Bunch respectfully requests that certiorari and summary reversal should be granted because the Fourth Circuit's conclusion that Edwards was ambiguous and not clarified until after his conviction became final conflicts with Edwards, this Court's subsequent applications of Edwards and settled retroactivity principles.

Respectfully submitted,

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June __, 1992

No. ____

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CERTIFICATE OF SERVICE

I, AMY BERMAN JACKSON, a member of the Bar of this Court, hereby certify that on this 11th day of June, 1992, 7 copies of the Petitioner's Reply to Respondent's Response to Petition for Writ of Certiorari in the above-entitled case were mailed, first-class, postage prepaid, to John H. McLees, Jr., Esquire, Assistant Attorney General for the Commonwealth of Virginia, Supreme Court Building, 101 North Eighth Street, Richmond, Virgnina 23219.

Amy B. Jackson

Amy Berman Jackson
Counsel of Record

No. 91-1757

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APPENDIX

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June __, 1992

EXHIBIT
A

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA,

vs

TIMOTHY BUNCH,

Defendant.

Criminal Docket Nos. 11646, 11647, 11648, 11649

Circuit Courtroom No. 2
Prince William County Courthouse
Manassas, Virginia

Friday, June 4, 1982

The above-entitled matter came on for hearing before THE HONORABLE PERCY THORNTON, JR., Judge, in and for the Circuit Court of Prince William County, Virginia, at 9:11 o'clock a.m.

APPEARANCES:

On behalf of the Commonwealth:

PAUL B. EBERT, ESQUIRE

On behalf of the Defendant:

RICHARD H. BOATWRIGHT, ESQUIRE
AND
LLOYD HINRICHS

- - -

Circuit Court Clerk's Office
Prince William County, Va.
Filed November 15 1982
Katherine Smith Deputy Clerk

A Yes, sir.

Q You certainly didn't tell them anything about the whereabouts of the gun or anything else that they wanted to know until after that point; isn't that correct?

A Sir, I didn't actually tell them.

Q You didn't tell them anything until after that point.

In fact, you told us the only time you said anything is when Cahill started to go out of the room which was an hour later, to your recollection?

A Yes, sir.

Q And, at one point after they were talking to you you said you really didn't know if you should talk about it and if I may use your words, that you might want to talk to a lawyer; is that right?

MR. BOATWRIGHT: Excuse me, I don't believe he testified to that on direct.

THE COURT: He testified he told them he wanted a lawyer. That's what he said.

MR. EBERT: I understand. I'm asking the questions. I don't care what he said on direct.

THE DEFENDANT: Yes, sir, I'm sure I said that several times and along with I didn't want to talk to him